Yee Kang And Sons & Anor v Chim Yiam, Lee, Tan & Associates

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO D-24NCC-91–03 OF 2012
MOHAMAD ARIFF J
29 MAY 2012

Civil Procedure — Injunction — Fortuna injunction — Injunction to restrain winding up petition — Whether defendant was using winding up proceedings oppressively and inequitably in violation of settled principles relating to fortuna injunction — Whether notices of demand in respect of unpaid legal fees were grounded on genuine bona fide debt — Whether allowing defendant to file bill of costs for debt was suitable alternative procedure

The plaintiffs had instructed the defendant, a legal firm, to represent them in a dispute. Based on these instructions the defendant had filed a civil suit and collected the first portion of its agreed legal fees of RM100,000. Subsequently, the plaintiffs became dissatisfied with the defendant's conduct of their case. The plaintiffs thus terminated the services of the defendant as their solicitors on record for the civil suit. The plaintiffs also agreed to treat the RM100,000 that they had already paid as 'sufficient cover of all fees'. However, the defendant took the stand that it was only prepared to discharge itself as the plaintiffs' solicitors provided the plaintiffs paid the agreed legal fees of RM22.96m, which was the sum the parties had allegedly agreed to as the defendant's fees. In support of this claim, the defendant relied upon its warrant to act that provided that the plaintiffs agreed to pay the defendant the sum of RM100,000 and 50% of the proceeds of any recovered sum, which according to the defendant amounted to RM22.96m. However, in their next letter to the plaintiffs the defendant claimed that it had never agreed to a fee of 50% of the claim upon recovery as this would be a contingency fee and therefore illegal. Instead the defendant demanded full payment of RM50,000 or the allegedly outstanding legal fees and threatened legal action if this sum was not paid. The plaintiffs lodged a complaint to the Bar Council against the solicitor from the defendant firm. The Disciplinary Board found that the charging of contingency fees amounted to professional misconduct. However, on appeal this decision was reversed. Thereafter, the defendant issued notices under s 218 of the Companies Act 1965 to the plaintiffs, claiming the payment of the alleged outstanding amount of RM22.96m owed to the defendant by the plaintiffs as balance of the outstanding legal fees. The plaintiffs thus filed the present action seeking, inter alia, a permanent injunction against the defendant from filing any winding up petition against them and a declaration that the plaintiffs did not owe the defendant the sum of RM22.96m. At the trial the

defendant submitted that it would not be proceeding with winding up proceedings but would instead be proceeding to file a bill of costs for the sum of RM22.96m. The defendant also raised the issue of res judicata with regard to the issues raised by the plaintiffs in this action.

Held, allowing the application with costs of RM30,000:

(1) The appeal from the decision of the Disciplinary Board to the High Court in the professional misconduct matter had little to do with the merits of the present contractual claims between the parties. To this extent, res judicata could not be held either relevant or applicable (para 22).

(2) This court was of the opinion that the only important issue in this case was whether the defendant was using winding up proceedings oppressively and inequitably in violation of settled principles relating to a Fortuna injunction. The facts were crystal clear in establishing that the s 218 demands were not grounded on any genuine bona fide debt but were in fact grounded on spite and malice. The defendant was unhappy with the termination of its legal services by the plaintiffs and as a result had demanded the payment of RM22.96m as unpaid fees. On the evidence and the law, this was a case which clearly fell within the two limbs of the fortuna principles, namely where the presentation of the winding up petition would produce irreparable harm in a situation where the petition if presented would have no chance of success, and second, the defendant was choosing to assert a disputed claim by a procedure which would produce irreparable harm to the plaintiffs instead of opting for a more suitable alternative procedure (see paras 26–28).

(3) The evidence showed clearly that the RM22.96m claimed was a contingency fee claim, which the defendant itself admitted was illegal. Thus, in the interest of justice and for full and complete determination of this dispute, it was found that it was only proper that judgment be entered for the plaintiffs not only to injunct the filing of winding up proceedings but also to order a declaration that the sum of RM22.96m or any part thereof was not owed or owing by the plaintiffs to the defendant (see para 29).

(4) Costs of RM30,000 were awarded to reflect the censure of the court with regard to the predominant issues in this case, namely mala fide and abuse of process (see para 30).

[Bahasa Malaysia summary

Plaintif-plaintif telah mengarahkan defendan, sebuah firma guaman, untuk mewakili mereka dalam satu pertikaian. Berdasarkan arahan-arahan ini, defendan telah memfailkan guaman sivil dan memungut bahagian pertama yuran guaman yang dipersetujui sebanyak RM100,000. Seterusnya,

plaintif-plaintif tidak berpuas hati dengan cara defendan mengendalikan kes mereka. Oleh itu, plaintif-plaintif menamatkan perkhidmatan defendan sebagai peguamcara mereka pada rekod untuk guaman sivil. Plaintif-plaintif juga bersetuju untuk menganggap RM100,000 yang telah dibayar oleh mereka sebagai 'mencukupi untuk menampung semua yuran'. Walau bagaimanapun, defendan mengambil pendirian bahawa mereka hanya bersedia untuk melepaskan dirinya sebagai peguam cara plaintif sekiranya plaintif-plaintif membayar yuran guaman yang dipersetujui sebanyak RM22.96 juta, iaitu jumlah yang dikatakan dipersetujui oleh pihak-pihak sebagai yuran defendan. Bagi menyokong tuntutan ini, defendan bergantung kepada waran untuk bertindak iaitu plaintif-plaintif bersetuju untuk membayar defendan sejumlah RM100,000 dan 50% daripada hasil daripada jumlah yang didapatkan kembali, menurut defendan berjumlah RM22.96 juta. Walau bagaimanapun, dalam surat mereka seterusnya kepada plaintif-plaintif, defendan mendakwa bahawa mereka tidak pernah bersetuju untuk yuran 50% daripada tuntutan selepas dapatan kembali kerana ini merupakan yuran kontigensi dan oleh itu menyalahi undang-undang. Sebaliknya defendan menuntut bayaran penuh RM50,000 atau yuran yang didakwa belum dibayar dan mengugut akan membuat tindakan undang-undang sekiranya jumlah ini tidak dibayar. Plaintif-plaintif membuat satu aduan kepada Badan Peguam terhadap peguam cara daripada firma defendan. Badan Disiplin mendapati bahawa mengenakan yuran kontigensi merupakan satu salah laku profesional. Walau bagaimanapun, semasa rayuan keputusan ini diubah. Selepas itu, defendan mengeluarkan notis-notis di bawah s 218 Akta Syarikat 1965 kepada plaintif-plaintif, mendakwa bahawa bayaran yang dikatakan belum dibayar berjumlah RM22.96 juta terhutang kepada defendan oleh plaintif-plaintif sebagai baki yuran guaman belum dibayar. Plaintif-plaintif oleh itu memfailkan tindakan ini dan menuntut, antara lainnya, satu injuksi tetap terhadap defendan daripada memfailkan sebarang petisyen penggulungan terhadap mereka dan satu pengisytiharan bahawa plaintif-plaintif tidak berhutang sejumlah RM22.96 juta kepada defendan. Pada perbicaraan, defendan menghujah bahawa mereka tidak akan meneruskan prosiding-prosiding penggulungan tetapi sebaliknya meneruskan untuk memfailkan bil kos bagi jumlah RM22.96 juta. Defendan juga mengemukakan isu res judicata berhubung isu yang ditimbulkan oleh plaintif-plaintif dalam tindakan ini.

Diputuskan, membenarkan permohonan dengan kos RM30,000:

(1) Rayuan daripada keputusan Badan Disiplin kepada Mahkamah Tinggi mengenai perkara salah laku profesional mempunyai kaitan yang sedikit dengan merit-merit tuntutan kontrak ini antara pihak-pihak. Setakat ini, res judicata tidak boleh diputuskan sama ada relevan atau terpakai (lihat perenggan 22).

(2) Mahkamah ini berpendapat bahawa isu penting dalam kes ini hanyalah

sama ada defendan menggunakan prosiding-prosiding penggulungan secara menindas dan tidak saksama dengan melanggar prinsip-prinsip yang ditetapkan berhubung injunksi fortuna. Fakta-fakta jelas membuktikan bahawa tuntutan s 218 tidak berdasarkan sebarang hutang tulen bona fide tetapi sebenarnya berdasarkan kezaliman dan niat jahat. Defendan tidak gembira dengan penamatan perkhidmatan undang-undang oleh plaintif-plaintif dan mengakibatkan tuntutan bayaran RM22.96 juta sebagai yuran tidak dibayar. Berdasarkan keterangan dan undang-undang, ini merupakan kes yang jelas terangkum di dalam dua bahagian prinsip-prinsip fortuna, iaitu pengemukaan petisyen penggulungan akan mengakibatkan kemudaratan yang tidak boleh diperbaiki dalam situasi di mana sekiranya petisyen tersebut yang dikemukakan tidak mempunyai peluang untuk berjaya, dan kedua, defendan memilih untuk menegaskan tuntutan yang dipertikaikan melalui prosedur yang akan menghasilkan kemudaratan yang tidak boleh diperbaiki kepada plaintif-plaintif daripada memilih prosedur alternatif yang lebih sesuai (lihat perenggan 26–28).

(3) Keterangan menunjukkan dengan jelas bahawa RM22.96 juta yang dituntut merupakan tuntutan yuran kontigensi, di mana defendan sendiri mengakui adalah menyalahi undang-undang. Oleh itu, atas kepentingan keadilan dan untuk penentuan penuh dan lengkap pertikaian ini, didapati bahawa ia hanya betul sekiranya penghakiman dimasukkan untuk plaintif-plaintif bukan hanya untuk menginjunksikan pemfailan prosiding-prosiding penggulungan tetapi juga untuk mengarahkan satu pengisytiharan bahawa jumlah RM 22.96 juta atau mana-mana bahagian daripadanya tidak dihutang atau terhutang oleh plaintif-plaintif kepada defendan (lihat perenggan 29).

(4) Kos RM30,000 diawardkan untuk mencerminkan kecaman mahkamah berhubung isu-isu utama kes ini, iaitu mala fide dan penyalahgunaan proses (lihat perenggan 30).]

Notes

For cases on injunction to restrain winding up petition, see 2(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 3397–3410.

Cases referred to

Arkitek Tenggara Sdn Bhd v Mid Valley City Sdn Bhd [2007] 5 MLJ 697; [2007] 6 CLJ 93, FC (refd)

Fortuna Holdings Pty Ltd v The Deputy Commissioner of Taxation of the Commonwealth of Australia [1978] VR 83, SC (folld)

Letchumanan a/l Gopal (representative for the estate of Rajammah a/p Muthusamy, deceased) v Pacific Orient & Co Sdn Bhd [2011] 6 MLJ 788; [2011] 5 CLJ 866, CA (refd)

Mobikom Sdn Bhd v Inmiss Communications Sdn Bhd [2007] 3 MLJ 316; [2007] 3 CLJ 295, CA (refd)

Takako Sakao(f) v Ng Pek Yuen(f) & Anor (No 2) [2010] 2 MLJ 141; [2010] 1 CLJ 419 (refd)

Legislation referred to

Legal Profession Act 1976 s 84
Companies Act 1965 s 218

Azhar Arman Ali (Arman Yunos) for the plaintiffs.
Leo Camoens (Nashir Johal & Co) for the defendant.

Mohamad Ariff J:

INTRODUCTION

[1] In allowing the plaintiffs' claim in this case on the originating summons with costs, I had provided the summary grounds for this court's decision in the presence of plaintiffs' counsel (defendant's counsel was absent when the case was called up but plaintiffs' counsel undertook to inform learned counsel of the decision). These grounds as read are reproduced below:

> Having considered the prayers in the originating summons, the affidavits filed by the parties, and the submissions, I am allowing the application as prayed in encl 1, in terms of prayers (1)–(4) and costs of RM30,000 to be paid by the defendant to the plaintiffs.
>
> This is a clear case where this court should exercise its jurisdiction to order that a fortuna injunction be issued against the defendant where the latter has purposely issued a statutory demand under s 218 of the Companies Act with malice in a situation where the defendant was perfectly aware the alleged debt of RM22.9m was vigorously disputed. On the facts, both limbs of fortuna injunction will apply. The defendant is resorting to a procedure which will cause irreparable harm to the plaintiffs when its case is bound to fail. Further, the defendant is also resorting to winding up proceedings which will cause irreparable harm where a debt is disputed instead of using a more suitable alternative procedure. The sending of the statutory notices as a precursor to the filing of a winding up petition is, on the facts, an abuse of process and is being used unjustly as an instrument of economic oppression and out of malice.
>
> There is no need to postpone a determination on whether the alleged fees of RM22.96m are due and to require the issue to be determined in another forum because all the necessary facts are before this court. It is clear on the evidence aside from being in the nature of contingency fees, the sum is never owed in the first place. No proceeds from the litigation have been recovered by the defendant for the plaintiff. Indeed the defendant was terminated as the plaintiffs solicitors after the plaintiff had paid them RM100,000 as legal fees for work done.

Hence I am of the opinion it is therefore proper to allow prayer (2) for a declaration that the plaintiffs do not owe the RM22.96m to the defendant and that the demand for the sum is an abuse of process, and consequently there should be an order that damages suffered by the plaintiffs and occasioned by this demand be assessed by the deputy registrar.

As for costs, a sum of RM30,000 will be reasonable instead of ordering costs on an indemnity basis. This amount is reasonable bearing in mind the malicious conduct of the defendant who has audaciously attempted to construct a legal case out of a patently unsupportable set of facts.

[2] Given the circumstances of this particular case where the defendant is a legal firm, I informed plaintiffs' counsel, Encik Azhar Arman, that I would provide an elaboration of these grounds subsequently. In this case there are issues in relation to what should be regarded as permissible conduct on the part of solicitors. The defendant has since appealed. I now provide my fuller analysis of the background facts, the evidence and the law in amplification of these grounds.

THE BACKGROUND FACTS

[3] Sometime in 2008 the plaintiffs had instructed Mr Lian Meng Wah, a lawyer from the defendant firm, to represent the plaintiffs and another person (Char Hon Loong) in a dispute. An action was subsequently filed by the defendant firm ie Civil Suit No D1–22–2261 of 2008. There was a discussion between the plaintiffs and Mr Lian Meng Wah on legal fees before this particular suit was filed. This discussion occurred on 14 October 2008. Following this, a lawyer of the defendant, Md Hairani, sent an email dated 9 November 2008 to the plaintiffs. Hairani was assisting Lian Meng Wah at that time. See exh CHW1 to the plaintiffs' affidavit in support affirmed by Char Hon Wah. As evident from the contents of the email, the defendant firm had sent a template of a warrant to Act under what it deemed as 'Pursuant to Section 84 Legal Profession Act'.

I reproduce this template below:

> Warrant to Act
>
> Pursuant to Section 84 Legal Profession Act
>
> Date:
>
> Messrs Chim Yiam, Lee & Associates
>
> Advocates & Solicitors
>
> …
>
> Dear Sirs,

Re: Kuala Lumpur/Johor Bahru High Court Char Hon Loong, Ye Kang and Sons Sdn Bhd and Nilai Mantap Sdn Bhd vs Dato' IR. Steve Chong Voon On, Serious Harvest SDN Bhd and Ikon Bestari SDN Bhd

With reference to the above, we hereby appointed your legal firm to act for us in respect of the above matter.

We agree to irrevocably and unconditionally pay Counsel Mr. Lian Meng Wah, NRIC No: 590314-04-5483 legal fees in the sum of RM100,000.00 and 50 % of proceeds of claim upon recovery of same.

Thank you.

Yours faithfully,

…

Char Hon Loong

…

Ye Kang and Sons Sdn Bhd

…

Nilai Mantap Sdn Bhd

[4] The plaintiffs then issued this 'Warrant to Act' in the exact terms of the advice through the email as seen above. See exh CHW2 to the affidavit in support.

[5] The court action was subsequently filed and the first portion of the agreed legal fees ie RM100,000 was duly paid to the defendant. Between six to seven months thereafter, the plaintiffs became dissatisfied with the defendant's conduct of the case. By letter dated 9 June 2009, the plaintiff terminated the services of the defendant as the solicitors on record for the said civil suit. See exh CHW3, and again it is illustrative and important to quote the relevant contents in full, which I do below:

Date: 9th June 2009

Chim Yiam, Lee & Associates

Advocates & Solicitors

…

Attention: Mr. Jeffry Lian

Dear Jeffry,

Char Hon Loong, Ye Kang & Sons Sdn Bhd, Nilai Mantap Sdn Bhd v Dato' IR. Chong Yoon On, Series Harvest SDN Bhd, Ikon Bestari SDN Bhd, Southcon Builders SDN Bhd - Termination of Legal Services

A We refer to the above.

We regret to inform that we wish to terminate your legal services to further act on our behalf for the aforesaid case with immediate effect on the following reasons:-

(1) Failed to provide us all the court documents filed on time;

B (2) Failed to provide us all the official documents on time;

(3) Misled us by telling that inter partes injunction has been obtained on the 30 in January 2009 before Justice Hishammuddin;

(4) Failed to notify and seek our consent to extend the hearing date of injunction to 28th May 2009 upon request of Defendant's lawyer;

C

(5) Reluctant to meet up for meetings and discussions for more than 7 occasions;

(6) Knowingly or intentionally cut-off the phone halfway through tele-conversations.

D We believe the RM 100,000 that we had advanced to you in November 2008 is sufficient to cover all your fees and disbursements, and we do not intend to ask for a refund.

Kindly acknowledge receipt by signing and returning to us the duplicate copy of this letter.

E

Thank you …

[6] The defendant's reply can be found at exh CHW4. In fairness to the defendant, the contents of the plaintiffs letter was substantially denied, with the defendant firm stating their position that they were unable to accept the purported termination of the legal services. This reply letter ended by stating:

F

Hence, we are unable to accept your purported termination of our legal services. We shall resist any move to appoint other lawyers to prejudice our interest.

G

Notwithstanding the above, we are prepared to discharge ourselves provided you forthwith pay the agreed legal fees of RM22.96 million.

[7] It has to be noted and until this stage of the correspondence, the H plaintiffs, although unhappy with the services rendered, agreed to treat the RM100,000 already paid as 'sufficient to cover all … fees' and the plaintiffs did not intend to ask for a refund. As stated by plaintiffs' counsel in his written submission, the plaintiffs 'were willing to part ways with the Defendant on good terms' and 'even considered that the sum of RM 100,000.00 would be a I reasonable compensation for the Defendant' bearing in mind that the defendant only conducted the suit for a brief period ie from November 2008 to about June 2009. On the other hand, the defendant took the extreme position that they were only prepared to discharge themselves as solicitors provided the plaintiffs paid 'the agreed legal fees of RM 22.96 million'.

[8] The defendant wrote a second letter day after. This letter dated 13 June 2009, which appears as exh CHW5, surprisingly stated that 'after consideration', the defendant were unable to act for the plaintiffs as the plaintiffs had terminated the services with immediate effect. The letter went on to ask the plaintiff to 'kindly arrange for a solicitor to take over conduct of the matter fixed for hearing at Kuala Lumpur High Court (Dagang 1) on 15.6.2009'. It added 'kindly forthwith pay the agreed legal fees of RM22.96 million'.

[9] A long letter dated 15 June 2009 from the plaintiffs followed. It referred to the RM22.96m and affirmed the plaintiffs termination of the defendant's legal services. The plaintiffs then stated in strong terms that they had been misled into agreeing to pay the defendant the 50% of any recovered sum, with the relevant paragraph stating:

> … your alleged claim for your purported legal fees in the sum of RM22.96 million is baseless and never been the intention of both parties as the judgment has not been entered in our favour and nor out of court settlement has been reached during your retainer period. We wish to clarify that our Warrant to Act drafted by you (please refer to the email attached) has misled us to agree to pay you 50% of the entitlement upon recovery of the same from the defendant where the said 50% shall include the fees to be shared among your legal team! Also, the undertaking to refund the said RM100 K is not given to others as agreed, please refer to our emailed attached …

[10] The next letter from the defendant firm is, to say the least, very surprising. The defendant now agreed that Mr Lian Meng Wah never agreed to a fee of 50% of the claim upon recovery as at this would be contingency fee! Nevertheless, the defendant now took the position that since the plaintiffs had terminated the services of the counsel (presumably Mr Lian Meng Wah), the defendant was claiming for 'full fee' of RM150,000. This RM150,000 was alleged to be an agreed sum wherein the RM100,000 had been paid and the balance had been forwarded by a cheque which allegedly the plaintiffs had asked the defendant to hold until the plaintiffs were in receipt of funds. Again, it will be necessary to look at the full contents to fully appreciate the position adopted by the defendant firm. To quote the contents:

> We refer to your letter terminating our retainer.
>
> Please take note that our counsel Lian Meng Wah has only agreed at all times as follows:-
>
> (1) RM 100,000.00 fee for the injunction;
>
> (2) RM50.000.00 retainer fee for the case proper.
>
> Our Mr Lian never agreed to a fee of 50% of the claim upon recovery as at this is contingency fee.

> Be that as it may, since you have terminated our firm and our counsel, we hereby claim full fee RM 150,000.00.
>
> Please take note that this RM 150,000.00 is an agreed sum wherein you have remitted RM100.000.00 and the balance RM 50,000.00 by cheque PBB 552126 dated 29.11.2008 which you asked to hold until you are in receipt of funds.
>
> Since the injunction matter has been attended to by us and since you have terminated our services, we hereby demand a fresh cheque the issue of RM50,000.00 as the PBB cheque is stale.
>
> Further take note that in the event you fail to replace the cheque within seven days hereof, we shall proceed with legal action to recover the same."

See exh 'CHW7'.

[11] The plaintiffs' reply to this surprising turn in the defendant's position was very categorical. The letter in reply emphasised that the warrant to act was in fact drafted by the defendant and therefore it was not true that Mr Lian never agreed to the fee of 50% of the claim upon recovery as this was contingency fee. See exh CHW8. Nevertheless, the defendant in reply to this letter persisted in maintaining that they did not accept the warrant to act issued as it contained elements of contingency fee 'which is illegal'. The defendant demanded full payment of the RM50,000 and threatened legal action if the cheque for RM50,000 was not replaced on or before 23 June 2009. See exh CHW9.

[12] The plaintiffs' response to this letter can be seen in exh CHW10.

I quote the relevant passage:

> We wish to reiterate that the Warrant to Act dated 10th November 2009 shall be binding on you as you have agreed to such fees entitlement in the meeting held on 14th October 2008 stated in our letter dated 15th June 2009 by virtue of your email drafting the said content on 9th November 2009. As such, the Warrant to Act is indisputable. Now only you claim that the Warrant to Act is illegal, in other words, you have induced us to issue you with the illegal document where you knowingly agreed to something which is in breach of the law!

[13] The defendant's position that it did not accept the warrant to act as it contained elements of contingency fee was reiterated in a subsequent letter from the defendant dated 22 June 2009:

> … we did not accept the Warrant to Act issued by you as it contained elements of contingency fee which is illegal. We did not pen our signature on the document.

See exh 'CHW11'.

THE CIVIL SUIT IN SESSIONS COURT FOR RM50,000 LEGAL FEES OUTSTANDING

[14] It is necessary at this juncture to note two important events. The first

has to do with the claim filed by Mr Lian Meng Wah against the present plaintiffs and Char Hon Loong as the defendants. This was a claim for the RM50,000 legal fee allegedly outstanding. This claim was heard as a full trial and dismissed by the sessions court on 5 January 2011. See exh CHW13 for a copy of the judgment.

THE DISCIPLINARY PROCEEDING

[15] The second event concerns a disciplinary proceeding against Mr Lian arising out of a complaint lodged against him with the Disciplinary Board by the plaintiffs. The Disciplinary Board came to a finding that Lian had charged contingency fees and imposed a fine on him on a finding of professional misconduct. There was an appeal under the Legal Profession Act 1976 to the High Court from this decision. The High Court allowed the appeal in Suit No R2–17–11 of 2011.

LIAN MENG WAH'S SUIT FOR ABUSE OF PROCESS

[16] In this connection it has also to be noted that there was a suit filed in the High Court by Lian Meng Wah against the plaintiffs for an alleged tort of abuse of process arising from the lodgement of the complaint by the plaintiffs in which he claimed RM6.4m. This suit was also dismissed by the High Court on 2 November 2010. There was an appeal filed to the Court of Appeal but this was struck out on 6 October 2011.

THE FILING OF THE S 218 NOTICES FOR RM22.96M LEGAL FEES

[17] It was only later, after all these events occurred, that the defendant issued notices dated 13 February 2012 under s 218 of the Companies Act 1965 to the plaintiffs. See exh CHW12. The s 218 notices claimed the payment of the alleged outstanding amount of RM22.96m owing to the defendant by the plaintiffs, being 'balance outstanding fees'.

THE PLAINTIFFS' PRAYERS IN THE ORIGINATING SUMMONS

[18] The plaintiffs then filed this present action praying for the following relief:

(a) a permanent injunction against the defendant from filing any winding up petition against the plaintiffs;

(b) a declaration that the plaintiffs do not owe the defendant the sum of RM22.96m or any part thereof, and that the demand for RM22.96m is an abuse of process;

(c) damages to be assessed; and

(d) costs on an indemnity basis.

[19] The filing was followed by an application for an interlocutory injunction which was allowed by this court.

THE SUBMISSION FOR THE DEFENDANT

[20] It has to be placed on record that when the submissions were heard in the presence of counsel for both parties on the hearing of the originating summons, counsel for the defendant, Mr Leo Camoens, informed the court that he had advised his client not to proceed with any winding up proceeding but instead to proceed by way of the Legal Profession Act, ie to file a bill of costs which presumably was to be for the very same RM22.96m. I then enquired of counsel why the bill of costs had not been filed earlier. To this enquiry, counsel indicated he needed to take instructions on it. The court was informed subsequently on the adjourned further hearing date, rather inconclusively, that since the defendant had considered they had an agreement in writing, they were therefore of the view there was no necessity to file a bill of costs.

THE DEFENCE OF RES JUDICATA/ISSUE ESTOPPEL

[21] On these facts, the only substantive defence which could be considered was in relation to an alleged res judicata/issue estoppel point. This was raised in the affidavit in reply, and has to do with the successful appeal in R2–17–11 of 2011. See affidavit in reply (2) affirmed by Wong Chim Yearn and exh WCY-RR thereto.

[22] The evidence discloses that the appeal from the decision of the Disciplinary Board under the Legal Profession Act in the professional misconduct matter succeeded on the basis that the Disciplinary Board had referred to, and decided on, the wrong standard of proof, namely on a balance of probabilities instead of beyond reasonable doubt in a professional misconduct matter. This appeal has little to do with the merits of the present contractual claims between the parties. To this extent, res judicata/issue estoppel cannot be held either relevant or applicable.

[23] Encik Azhar, counsel for the plaintiffs, cited the very pertinent Court of Appeal decision in *Letchumanan a/l Gopal (Representative for the estate of Rajammah a/p Muthusamy, deceased) v Pacific Orient & Co Sdn Bhd* [2011] 6 MLJ 788; [2011] 5 CLJ 866,which is a case dealing with two different types of action, namely a 'liability' action and a subsequent 'recovery' action involving

an insurer. The principles applicable in a case such as this has been clearly analysed by the Court of Appeal in the following passage:

> The second issue raises a point of law which may be stated in this manner:
>
> > Whether in the recovery action the question of liability of the tortfeasor which has been determined in the liability action may still be raised and argued to entitle the insurer to refuse satisfying the judgment.
>
> Learned counsel for the respondent had argued against the relitigation on the liability issue and that the doctrine of res judicata is applicable as a bar.
>
> The appellants' counsel on the other hand, pointed out that the High Court in the recovery action had observed that the sessions court merely made a finding that the deceased was a passenger. There was no determination made below if the deceased was an employee to be covered under the policy.
>
> So, is res judicata applicable to bar the issue of liability from being raised again, this time by the insurer?
>
> Literally translated, res judicata is 'the fact has been decided'. It expresses a general public interest policy that the same issue (or cause of action) should not be litigated more than once even if the parties are different. It prevents vexatious litigation and any abuse of the courts' process on the premise that final judgments are binding and conclusive.
>
> (See *Henderson v Henderson* [1843] 3 Hare 100). The criminal law equivalent is the doctrine of double jeopardy.
>
> It is in the broader sense of res judicata that the Appellant submitted that the liability issue should now be precluded from being raised at the recovery stage since it has been adjudged in the previous liability action.
>
> *It is our view that the liability and recovery actions are distinct from each other. The former is a claim founded on tort whereas the latter is based on a statutory right provided under the provisions of the RTA. For this reason alone it would be unjust to bar the insurers from raising afresh the issue of its liability even to the extent of adducing evidence on the same issue at the recovery action stage.*
>
> In the liability action, the issue before the court would be to determine negligence whereas in the recovery action the issues include the construction of the terms in the insurance policy and the application of s 91 and s 96 of the RTA. It is upon this construction of the insurance policy that the insurers raised for the first time in the recovery action. In this appeal, P & O, as the insurers is thus seeking to declare that the policy as against the deceased, is unenforceable due to the exception in its terms. This issue remains alive and was brought up on appeal to the High Court and now before us. (per Abdul Hamid Embong JCA, as His Lordship then was, at pp 875–876) (Emphasis added.)

[24] See also *Akitek Tenggara Sdn Bhd v Mid Valley City Sdn Bhd* [2007] 5 MLJ 697; [2007] 6 CLJ 93, where the Federal Court decided the res judicata

doctrine did not necessarily apply in the context of a decision in a judicial review matter from the findings of a disciplinary tribunal, ie on the facts of the appeal, the Lembaga Arkitek Malaysia. The Federal Court drew a distinction between a finding on a disciplinary matter, such as professional misconduct, as opposed to a finding on the contractual rights of parties. The applicable principles are comprehensively analysed in the following passages in the judgment:

> In order to determine whether the LAM decision is capable of amounting to res judicata by virtue of being a decision of the Supreme Court it is first necessary to ascertain the meaning of the term 'res judicata'. The classic text *Res Judicata* by Spencer Bower and Turner (3rd Ed), defines it at p 1 as follows:
>
> > In English law a res judicata is a decision pronounced by a judicial tribunal having jurisdiction over the cause and the parties which disposes once and for all of the matters decided, so that except on appeal they cannot afterwards be relitigated between the same parties or their privies.
>
> It is thus clear that res judicata applies only in respect of a matter over which the court has pronounced a judgment.
>
> In this case the LAM decision was upheld by the Supreme Court pursuant to a proceeding for judicial review. It is settled law that judicial review is concerned with the process of decision making and not with the decision itself (see *Chief Constable of North Wales Police v Evans* [1982] 1 WLR 1155). In *Tanjong Jaga Sdn Bhd v Minister of Labour and Manpower & Anor* [1987] 2 CLJ 119; [1987] CLJ (Rep) 368Abdoolcader SCJ said:
>
> > It is of considerable significance to bear in mind that judicial review is of the hearing and not of the decision …
>
> *As a judicial review proceeding is concerned with the decision-making process and not with the decision itseifthe decision cannot constitute res judicata of the court upholding the decision making process. …*
>
> In this case the Supreme Court did not pronounce any judgment on the decision made by LAM. It is therefore an error to describe the LAM decision as constituting res judicata by virtue of being a decision of the Supreme Court.
>
> Be that as it may, the conclusion just arrived at does not bring the matter to an end. The LAM decision is capable of constituting res judicata by reason of being a decision of LAM itself. LAM is not a court. What thus requires immediate consideration is the extent to which the doctrine of res judicata can extend to a tribunal which is not a court …
>
> *It is clear that LAM is only empowered to hear and determine disputes relating to professional conduct. The section gives no power to LAM to hear disputes between an architect and his client. …*

> *As the dispute in this case is one that relates to the agreement between an architect and his client with regard to services rendered it has nothing to do with the professional conduct of the architect.* The procedure laid down by law to be followed in respect of the dispute in this case is therefore as in r 21 … (per Augustine Paul FCJ at pp 12–123 of the report). (Emphasis added.)

[25] Although the Federal Court was there dealing with a judicial review matter, and in the present case we have a statutory appeal from the decision of the Displinary Board under the Legal Profession Act, similar principles should apply.

[26] Nevertheless, even assuming the defendant's argument on res judicata has any merit, which with respect it does not, the single most important issue in this present case is whether the defendant is using winding up proceedings oppressively and inequitably in violation of settled principles relating to a Fortuna injunction. The facts are crystal clear. The s 218 demands were not grounded on any genuine bona fide debt. I agree with Encik Azhar that these demands were, on the evidence, grounded on 'spite and malice'. It would appear that the defendant was particularly unhappy with the termination of the defendant's legal services, and as a result demanded (in a rather scattered and disorganised manner) the payment of RM22.96m unpaid fees. This extraordinary figure is a record of sorts.

THE FORTUNA PRINCIPLES

[27] On the evidence and the law, this is a case which clearly falls within the two limbs of the fortuna principles, namely where the presentation of the winding up petition will produce irreparable harm in a situation where the petition if presented will have no chance of success, and second, the defendant is choosing to assert a disputed claim by a procedure which will produce irreparable harm to the plaintiffs instead of opting for a more suitable alternative procedure. See eg *Mobikom Sdn Bhd v Inmiss Communications Sdn Bhd* [2007] 3 MLJ 316; [2007] 3 CLJ 295 for a comprehensive analysis by the Court of Appeal on the applicable principles drawn from *Fortuna Holdings Pty Ltd v The Deputy Commissioner of Taxation of the Commonwealth of Australia* [1978] VR 83.

[28] As often stated, fortuna principles, being grounded on equity, require application which will avoid oppressive consequences and abusive conduct.

[29] I have also carefully considered whether allowing the defendant to file a bill of costs for the RM22.96m could be regarded as a suitable alternative procedure. The evidence, however, showed too clearly this was a contingency fee claim. Indeed, it was admitted by the defendant that this was illegal and

therefore they had not agreed on RM22.96m as the legal fees. The defendant went so far as to argue, someone surprisingly, that they could not be held bound by the warrant to Act because they had not 'penned' their signature to it, whereas the template was prepared wholesale by the defendant firm. Thus, in the interest of justice and for full and complete determination of this dispute based on the evidence and the law, it is only proper that judgment be entered for the plaintiffs not only to injunct the filing of winding up proceedings but also to order a declaration that the sum of RM22.96m, or any part thereof, is not owned or owing by the plaintiffs to the defendant.

THE CLAIM FOR COSTS ON INDEMNITY BASIS

[30] On the matter of costs, the plaintiffs have prayed for costs on an indemnity basis, citing the Federal Court decision in *Takako Sakao(f) v Ng Pek Yuen(f) & Anor (No 2)* [2010] 2 MLJ 141; [2010] 1 CLJ 419. It was argued that this was an appropriate case for this court to award costs on an indemnity basis since the defendant had acted in bad faith and in an improper or oppressive manner. The plaintiffs' counsel impressed upon this court to award RM60,000 as costs on this basis. Costs being a matter of the court's discretion, and having evaluated the entire case heard before me fully, and considering the fact that this was heard as an injunction matter which had to be filed and heard with the utmost urgency, I was of the view that RM60,000 on an indemnity basis was a bit on the high side. I therefore awarded RM30,000 as fixed costs. Unfortunately counsel for the defendant was not present to be heard on this matter when the case was called up, but in any event the costs to be awarded against the defendant on the particular facts of the case, where the issues of mala fide and abuse of process are predominant, should in some measure reflect the censure of the court.

THE ORDER AND JUDGMENT

[31] Hence for the reasons adumbrated above, the application of the plaintiffs was allowed as prayed in encl 1, in terms of prayers (1)–(4) and costs of RM30,000 shall be paid by the defendant to the plaintiffs. Judgment was to be entered accordingly.

Application allowed with costs of RM30,000.

Reported by Kohila Nesan